Arizona's reason for failing to accept jurisdiction possibly because the people of the State anticipated that the burdens accompanying such power might be considerable." Mat 221. Where a State has not accepted such responsibility, we submit it cannot, in the absence of specific congressional authorization, tax income earned within the reservation by Indian residents of the reservation.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL, 1972.

We express no opinion in this brief on whether a State which obtains jurisdiction under P.L. 280 thereby obtains a right to tax within a reservation. See *Fowler v. Rhode & Ballington*, supra.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated, *Appellant,*

vs.

ARIZONA STATE TAX COMMISSION, *Appellee.*

On Appeal from the Supreme Court of Arizona

BRIEF FOR APPELLANT

OPINIONS BELOW

The September 21, 1971, order of the Supreme Court of the state of Arizona denying appellant's petition for review is not reported but is set in Appendix A, at p. 1a, of appellant's Jurisdictional Statement. The opinion of the Arizona Court of Appeals is reported at 14 Ariz. App. 452,484 P.2d 221, and is set out in Appendix B, at p. 2a of appellant's Jurisdictional Statement. The opinion of the Superior Court of the state of Arizona in and for Apache County is not reported, but is set out in Appendix C, p. 11a of appellant's Jurisdictional Statement.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a claim for refund of income tax paid during the calendar year 1967 brought under Ariz. Rev. Stat. Ann. §43-186(d) in the Superior Court of the State of Arizona in and for Apache County. Appellant contends that the assess-

ment, imposition and collection of the Arizona state income is invalid because (1) she is a Navajo Indian; (2) she resided at all material times within the confines of the Navajo Indian Reservation; and (3) her income during 1967 was derived from sources within the Navajo Indian Reservation, making the state statute invalid because it conflicts with the Treaty of 1868 between the United States and the Navajo Tribe. The Superior Court dismissed her complaint, holding that the applicability of the Arizona income tax laws against her was not violative of the federal government's responsibilities as trustee for the Indians nor did it interfere with tribal self-government. On appeal, the Arizona Court of Appeals affirmed the Superior Court's dismissal holding that the Arizona income tax law was validly applied to plaintiff, despite the Treaty of 1868, and the Supreme Court of Arizona denied appellant's petition for review of the judgment of the Court of Appeals.

(ii) The judgment sought to be reviewed is the order of the Supreme Court of Arizona denying appellant's petition for review entered on September 21, 1971. No opinion was filed. The Notice of Appeal was filed in the Superior Court of the State of Arizona in and for Apache County, the Court possessed of the record, on October 4, 1971.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Kennerly v. Montana District Court, 400 U.S. 423 (1971);

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965);

Williams v. Lee, 358 U.S. 217 (1959);

The Kansas Indians, 5 Wall. 737 (1867);

Worcester v. Georgia, 6 Pet. 515 (1832);

Cherokee Nation v. Georgia, 5 Pet. 1 (1831).

(v) The validity of Ariz. Rev. Stat. §43-102(a), as applied to appellant, is here involved. The full text of that provision is set out at pp. 3-4 of the Jurisdictional Statement.

QUESTION PRESENTED

Can the State of Arizona constitutionally apply a statute that imposes and collects taxes from the income of an Indian residing within the exterior boundaries of the Navajo Indian Reservation, without express Congressional authorization, and despite the Treaty of 1868 between the United States and the Navajo Tribe, and other Congressional enactments protective of Indian tribal sovereignty?

STATUTES INVOLVED

Section 20 of the Arizona Enabling Act, 36 Stat. 557, 569-70 (1910) is set out in pertinent part, at p. 21, n. 8, *infra*. Relevant portions of Buck Act are as follows:

§ 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

* * * * * *

§ 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. (July 30, 1947, c. 389, § 1, 61 Stat. 641.)

4 U.S.C. 161 (1970). Section 402(a) of the Indian Civil Rights Act of 1968, 25 U.S.C. §1322(a) is set out at p. 22, n. 10.

Section 404 of the Indian Civil Rights Act of 1968, 25 U.S.C. §1324, provides as follows:

> Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.
>
> (Pub.L. 90-284, Title IV, § 404, Apr. 11, 1968, 82 Stat. 79.)

6 U.S.C. 6292 (1970).

Sections 6 and 7 of Public Law 280, 67 Stat. 588 (1953) provide as follows:

> SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil

causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

67 Stat. 590.

STATEMENT OF THE CASE

Rosalind McClanahan, appellant herein, is a citizen of the United States and an enrolled member of the Navajo Tribe of Indians. During the 1967 calendar year, appellant resided within the exterior boundaries of the Navajo Indian Reservation, on that portion of the Reservation which is within the State of Arizona. Appellant's income during the 1967 calendar year was wholly derived from sources within the confines of the Navajo Indian Reservation. The total amount of tax withheld from appellant's income pursuant to Ariz. Rev. Stat. Ann. §43-188(f) amounted to $16.20. On April 1, 1968, appellant filed an Arizona State Individual Income Tax Return, a written protest against the collection of any tax on appellant's income by appellee, and a claim for refund for the entire sum withheld from her wages. No action was taken on appellant's claim for refund, so on October 4, 1968, appellant appealed her claim to appellee pursuant to Ariz. Rev. Stat. Ann §43-184(g). Appellee took no action on the claim. Thereafter appellant instituted a class action for refund in the Superior Court of Arizona in and for Apache County on June 17, 1969, pursuant to Ariz. Rev. Stat. Ann. §43-186(d). A.2. Appellee moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. A.1. Appellee based its position on the following premises: (1) the imposition of the income tax does not interfere with the self-government of the Navajo Tribe of Indians (2) the Arizona Enabling Act, 36 Stat. 557, 570 (1910) and the Arizona Constitution, Art. XX allow the State of Arizona to tax the income of Indians residing on a reservation; and (3) the Treaty of 1868 be-

tween the United States and the Navajo Tribe, 15 Stat. 667, does not contain any provision that would prohibit the imposition of the Arizona state income tax on that portion of the Navajo Indian Reservation within the boundaries of the State of Arizona.

Appellant in responding to appellee's assertions, contended that (1) absent an Act of Congress, Arizona has no power to tax appellant's income; (2) such arrogation of the income-taxing power by appellee would be violative of the right to self-government conferred on the Navajo Tribe of Indians by the Treaty of 1868; (3) and the Arizona Enabling Act and Article XX of the Arizona Constitution do not deprive the Navajo Tribe of the exclusive power to tax Indians but rather preclude the state of Arizona from applying its income tax laws to Indians residing on the Reservation.

The Superior Court dismissed appellant's complaint on January 12, 1970, holding that the state of Arizona did not require express congressional authority to tax appellant, and that the income tax imposed and collected by appellee did not interfere with tribal self-government. A.6. Appellant noticed an appeal to the Court of Appeals of the state of Arizona that same day. The Court of Appeals affirmed the Superior Court's dismissal of the complaint on April 28, 1971, and held that Arizona could validly apply its income tax statute on Indians residing and working on the Navajo Reservation without violating the Treaty of 1868 or the Enabling Act of Arizona. A.6,7; *McClanahan v. State Tax Commission*, 14 Ariz. App. 452, 484 P.2d 221. On May 11, 1971, appellant moved for a rehearing, which was denied on June 8, 1971. Appellant then filed a petition for review by the Supreme Court of Arizona on June 22, 1971, and said petition was denied on September 21, 1971. A.8. Appellant filed the Notice of Appeal to the Supreme Court of the United States in the Superior Court, the court possessed of the record, on October 4, 1971. A.1.

Appellant secured an extension of time to docket the appeal, which was due on December 20, 1971, and the

appeal was docketed on December 23, 1971. After inviting the Solicitor General to file a brief expressing the views of the United States on February 22, 1972, 40 U.S.L.W. 3398, this Court noted probable jurisdiction on May 15, 1972. 40 U.S.L.W. 3542.

SUMMARY OF ARGUMENT

Arizona has no jurisdiction to levy its income tax on Indians living and working on the Navajo Indian Reservation, because to do so would conflict with the federally protected right of the Navajo Tribe to control the internal affairs of its members. The Tribe's sovereignty derives from the Constitution and from its treaties with the United States, and it has been consistently recognized by decisions of this Court and by Acts of Congress.

State jurisdiction on Indian reservations has been allowed only pursuant to express Congressional enactment, or in cases where the persons and affairs of non-Indians are concerned. Congress has found it necessary to pass positive enactments allowing for the cession of federal protection and jurisdiction on Indian lands to the states. Arizona has failed to comply with these statutes and thus has not acquired jurisdiction to tax reservation Indians.

The correct rule as to state power on Indian reservations is that there is no state jurisdiction over the affairs of Indians, and there is state jurisdiction over non-Indians only where such does not infringe on the right of the Indians to govern themselves.

By enactment of the Buck Act, 4 U.S.C. §§105-110, Congress fully allocated taxing power on all federal lands including Indian reservations. Indians are expressly exempted by 4 U.S.C. §109.

The decision of the court below conflicts with governing federal law and should be vacated and remanded.

I

ARGUMENT

I. THE STATE OF ARIZONA HAS NO JURISDICTION TO TAX RESERVATION NAVAJOS, BECAUSE THE NAVAJO RESERVATION IS A SEPARATE SOVEREIGNTY.

The sovereign right of the Navajo Tribe to control the internal affairs of its members has been consistently recognized by treaties with the United States, by Acts of Congress, and by numerous decisions of this Court. Arizona's imposition of its state income tax on plaintiff, a Navajo living and working on the Navajo Reservation, is manifestly inconsistent with this governing body of law.

A. *Historical Development.*

In the case of *Worcester v. Georgia,* 31 U.S.(6 Pet.) 515 (1832), Mr. Chief Justice Marshall first set down the principles which govern federal-state-tribal relationships. The Court held invalid a series of Georgia statutes by which the state sought to exercise jurisdiction over the domain of the Cherokee Nation:

> . . . the acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.
>
> They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.
>
> They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

> They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

Id. at 561-562.

The basis for this holding was the conclusion, based on a learned analysis of the course of the country's relations with the Indian tribes, that the entire responsibility for dealing with Indian tribes was vested in the federal government, rather than the states, by the Constitution.[1]

> That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.

Id. at 559.

Consequently, any exercise of state jurisdiction over the Indians or their internal affairs was pre-empted by the fact that the full responsibility in this area had been entrusted by the Constitution to the federal government and that the treaties with the Indian tribes recognized their exclusive sovereignty over their own internal affairs.

The principles laid down in this decision are widely recognized as the basic authority in the field of state-Indian relations. U. S. Dept. of the Interior, FEDERAL INDIAN LAW (U.S. Gov't.Pr.Off.1958) pp. 501-505.[2] The *Worcester v. Georgia* holding has been consistently followed by the federal courts. See, *e.g.*, *United States v. Kagama*, 118 U.S. 375

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[1]It is significant in this respect that whereas the Articles of Confederation had prohibited any exercise of federal Indian authority that would infringe upon the legislative power of any state, this limitation was removed by the Constitution. *Worcester v. Georgia*, 31 U.S.(6 Pet.) at 559.

[2]FEDERAL INDIAN LAW (1958) is a revised version of F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (U.S.Gov't Pr. Off. 1942).

(1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S.(5 Wall.) 737 (1867); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 983 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court restated the principles of *Worcester v. Georgia, supra*, in light of subsequent history. Mr. Justice Black, speaking for the *Williams* court, began his analysis by reiterating the *Worcester* proposition that the whole intercourse with Indian Nations is vested in the government of the United States and that state laws have no force and effect within territory which is under the jurisdiction of an Indian nation. He then pointed out that:

> [the] broad principles of that decision came to be accepted as law. [Citations omitted.] Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of the Indians would not be jeopardized, but the basic policy of *Worcester* has remained.

Id. at 219.

In elaborating upon those areas in which the policy of *Worcester* had been modified, the *Williams* court referred to three separate lines of cases. It is evident from an analysis of these three lines of cases that they represent modifications of Worcester's broad territorial notion of Indian tribal jurisdiction but leave the role of the federal government *vis à vis* Indian tribes unchanged.

The first line of cases dealt with in *Williams, supra*, involves the proposition that an Indian can sue an outsider in state court. Mr. Justice Black cites *Felix v. Patrick*, 145 U.S.

> They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

Id. at 561-562.

The basis for this holding was the conclusion, based on a learned analysis of the course of the country's relations with the Indian tribes, that the entire responsibility for dealing with Indian tribes was vested in the federal government, rather than the states, by the Constitution.[1]

> That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.

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Consequently, any exercise of state jurisdiction over the Indians or their internal affairs was pre-empted by the fact that the full responsibility in this area had been entrusted by the Constitution to the federal government and that the treaties with the Indian tribes recognized their exclusive sovereignty over their own internal affairs.

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(1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *The Kansas Indians*, 72 U.S.(5 Wall.) 737 (1867); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 983 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

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The first line of cases dealt with in *Williams*, *supra*, involves the proposition that an Indian can sue an outsider in state court. Mr. Justice Black cites *Felix v. Patrick*, 145 U.S.

317 (1892), *United States v. Candelaria*, 271 U.S. 432 (1926), and *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). While noting that the statements in these three cases about the competency of an Indian to sue in state court are dicta,[3] appellant nevertheless would concede the validity of this proposition. This proposition does not, however, involve any modification of the *Worcester* principle of federal preclusion of state jurisdiction over Indian affairs.

The controversy involved in this line of cases centered around the question of whether Indians, who were widely regarded as "wards" subject to the "guardianship" of the United States, were competent, in the sense of being *sui juris*, to file actions in state court. The conclusion of the courts in the cases cited by Justice Black was that they were. The principle involved in these cases has been summarized by Felix Cohen as follows:

> As a general rule, an Indian irrespective of his citizenship or tribal relations, may sue in any state court of competent jurisdiction to redress any wrong committed against his person or property outside the limits of the reservation.

FEDERAL INDIAN LAW, p. 372. *See also* p. 379.

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[3]*Felix v. Patrick* and *U.S. v. Candelaria* both arose out of suits filed in federal courts, so there can be no doubt that the statements which they contain about the capacity of Indians to sue in state courts were dictum. *Harrison v. Laveen* was a case filed in state court by an Indian to seek a determination of an Indian's right to vote in Arizona elections. The case came to the Arizona Supreme Court on a motion to dismiss for failure to state a claim, so that the question of an Indian's right to sue was not directly before the court. Nevertheless, in the course of his opinion for the court, Mr. Justice Udall cited with approval the language from Felix Cohen's treatise *Federal Indian Law*, recognizing the federal preclusion of state jurisdiction over Indian affairs cited *infra* p. 17. Moreover, there can be no doubt that the principle was properly applied in the *Laveen* case since the issue in the case—the right of Indians to vote under Arizona law—is one which could and should be determined by the courts of Arizona.

It is clear from this that these cases make no inroad into the *Worcester* principle that state jurisdiction over Indian affairs on Indian reservations is totally pre-empted.

The second line of cases cited by Mr. Justice Black as effecting a modification of *Worcester* are those cases holding that state courts can try non-Indians who commit crimes against each other on a reservation.[4] This line of cases emanates from this Court's decision in *United States v. McBratney*, 104 U.S. 621 (1882). In *McBratney*, a non-Indian was indicted and convicted in Circuit Court of the United States for the District of Colorado, of the murder of another non-Indian within the boundaries of the Ute Reservation. The court agreed with McBratney's argument that the Federal Court lacked jurisdiction, and held that Colorado, upon admission to the Union on "equal footing" with the rest of the states, acquired criminal jurisdiction over non-Indians within its territory—including the Ute Reservation.

The same issue was again considered by this Court in *Draper v. United States*, 164 U.S. 240 (1896). The *Draper* facts were similar to those in *McBratney*, the main difference being that they took place in Montana. The defendant in *Draper*, in arguing that Montana state courts lacked jurisdiction over the crime of murder on an Indian reservation, attempted to distinguish *McBratney* on the grounds that the Montana Enabling Act contained a provision, not found in the Colorado Enabling Act, which provided that ". . . Indian lands shall remain under the absolute jurisdiction and control of the United States." The *Draper* Court followed *McBratney's* "equal footing" argument and maintained that an exception to state criminal jurisdiction should not be upheld unless no other interpretation of the statutory language was possible. The Court concluded that the language in the Enabling Act was not intended by Congress to bar state jurisdiction over a crime committed by one non-Indian

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[4]Citing *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896).

317 (1892), *United States v. Candelaria*, 271 U.S. 432 (1926), and *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). While noting that the statements in these three cases about the competency of an Indian to sue in state court are dicta,[8] appellant nevertheless would concede the validity of this proposition. This proposition does not, however, involve any modification of the *Worcester* principle of federal preclusion of state jurisdiction over Indian affairs.

The controversy involved in this line of cases centered around the question of whether Indians, who were widely regarded as "wards" subject to the "guardianship" of the United States, were competent, in the sense of being *sui juris*, to file actions in state court. The conclusion of the courts in the cases cited by Justice Black was that they were. The principle involved in these cases has been summarized by Felix Cohen as follows:

> As a general rule, an Indian irrespective of his citizenship or tribal relations, may sue in any state court of competent jurisdiction to redress any wrong committed against his person or property outside the limits of the reservation.

FEDERAL INDIAN LAW, p. 372. *See also* p. 379.

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against the person of another non-Indian occurring on an Indian reservation.[5]

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[5]The unique character of the kindred holdings in *McBratney, Draper* and *New York ex rel. Ray v. Martin* is demonstrated by the rather tortured reasoning they required. The statute upon which federal jurisdiction was sought to be based in these cases was §2145 of the Revised Statutes (now codified as 18 U.S.C. §1152) which provided:

> The general laws of the United States as to crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

The statute says nothing about the race of the perpetrator or victim, and appears to extend federal jurisdiction over all crimes committed in Indian Country. The effect of *McBratney* and its progeny was to carve out by judicial *tour de force* an exception to this plain statutory language. When the implications of §2145 were raised in *Martin,* the Court disposed of the issue summarily:

". . . the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding §2145." *Id.* at 500. The Court went on to observe in a footnote that the statute was in force at the time of the *McBratney* decision, "Yet, significantly the Court did not even find it necessary to mention." *Id.* at 500 n.6. The latter statement is not quite correct, since the *McBratney* decision does mention §2145. See 104 U.S. at 621-22. However, the Court is correct in its suggestion that the *McBratney* opinion failed to deal with what appeared to be the plain intent of Congress in enacting the statute to extend federal jurisdiction over all crimes committed in Indian Country. One writer has essayed an historical interpretation for these judicial pyrotechnics.

> The *McBratney* and *Draper* decisions appear to be based on now discredited theories of states' rights; but they appear too well established in federal jurisprudence to be overruled. Davis, *Criminal Jurisdiction over Indian Country in Arizona,* 1 ARIZ. L.REV. 62, 70 (1959).

This view correctly suggests that the issue in these cases did not involve Indian affairs at all, but a conflict between the federal government and the states over jurisdiction of crimes involving only non-Indians, a matter which was of no special concern to the federal government, but one of great importance to the states in a period of emphasis upon state power.

over crimes by or against Indians or their property. This issue was decided in *Donnelly v. United States*, 228 U.S. 243 (1913), when this Court held that the federal court had jurisdiction over the murder of an Indian by a non-Indian in Indian country. The *Donnelly* Court rejected the defendant's contention that federal jurisdiction was precluded by *McBratney* and *Draper* and held that defendant, even though a non-Indian, was not subject to the jurisdiction of the state courts. *Accord, Williams v. United States*, 327 U.S. 711 (1946); *United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926). In *Williams v. United States, supra*, this court summarized the case law as follows:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between *persons who are not Indians* . . . the laws and courts of the United States, *rather than those of Arizona*, have jurisdiction over offenses commited there, as in this case, by one who is not an Indian against one who is an Indian.

327 U.S. at 714. (emphasis added).

The third line of cases adverted to by Mr. Justice Black in *Williams v. Lee, supra*, is represented by his citation of *Utah & Northern Railway v. Fisher*, 116 U.S. 28 (1885). In that case, this Court upheld the power of the Territory of Idaho to tax the property of a railroad located on a strip of land which was within the exterior boundaries of an Indian reservation but which the Indians had ceded to the United States to be used for the railroad's right of way. The opinion sets forth two separate grounds for its decision upholding the tax. First, the reservation was within the geographical limits of the Territory and thus the state had some jurisdiction over the reservation—such jurisdiction being limited by the Treaty with the Indians that established the reservation. Second, the land in question had been withdrawn from the reservation as a result of the cession to the United States:

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> The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed.

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Utah & Northern Ry. Co. v. Fisher, supra, and the cases which it engendered (see *Thomas v. Gay*, 169 U.S. 264 (1898); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906), can be grouped under the rubric of upholding state power to tax the property on non-Indians which happens to be located on an Indian reservation. None of them involved Indians or Indian interests, and none of them sanctions the exercise of state jurisdiction over the Indians themselves.

These three lines of cases then—the cases tending to show that Indians could file cases in state court, the cases sanctioning state jurisdiction over crimes on Indian Reservations involving only non-Indians, and the cases upholding the power of the state to tax the property of non-Indians located on Indian reservations—effected the modification of *Worcester* noted in *Williams v. Lee*. The operative effect of these modifications must however be viewed in light of *Williams'* maintenance that "the basic policy of *Worcester* has remained." 358 U.S. at 219.

The essence of the holding in *Worcester* was that "[t]he whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." 31 U.S.(6 Pet.) at 561. In other words, since plenary power over Indian affairs is vested in the federal government, the states are pre-empted from acting in that area. See Comment, *Indian Battle for Self-Determination*, 58 CALIF. L.REV., 445, at 465; Felix Cohen, *"The Spanish Origin of Indian Rights in the Law of the United States,"* 31 GEO. L.J. 1 (1942). The secondary aspect of Mr. Chief Justice Marshall's analysis, based on an examination of the Treaties entered into with the Cherokees and other tribes up to 1832, was the conclusion that these treaties em-

bodied a policy of treating the territory of Indian reservations as being outside the limits of any state. 31 U.S.(6 Pet.) at 560. It was this second aspect of his analysis—the notion of tribal territorial sovereignty—which led him to his conclusion that the laws of Georgia could have no force within the geographic boundaries of the Cherokee Nation.

And it is this second aspect of Mr. Chief Justice Marshall's analysis which has been modified. Although his formulation was clearly correct at the time it was made, Indian lands gradually came to be considered as included within the territory of the state where they were located. And it is this factor which led this Court to sanction the extension of state jurisdiction onto Indian Reservations. *See e.g., Langford v. Monteith*, 102 U.S. 145 (1880). But the basic principle of *Worcester*, that the Indians themselves were subject to exclusive federal jurisdiction, did not change. The three lines of cases discussed above which sanction the extension of state jurisdiction over the person and property of non-Indians located in Indian Country, recognize the continued viability of this principle by taking care to note that the Indians are in no way affected by their holdings.

In *Williams v. Lee*, Mr. Justice Black reconciled the change in *Worcester's* preclusion of state jurisdiction over Indian territory with the continuance of *Worcester's* preclusion of state jurisdiction over Indians themselves when he concluded:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of Indians to make their own laws and be ruled by them.

358 U.S. 221.

The *Williams* test harmonizes the three lines of cases upholding state jurisdiction over non-Indians on the reservation with the fact that "[the] policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1944). Earlier Felix Cohen, the noted Indian law authority, offered the same—if somewhat more extensive—test for state jurisdiction:

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> . . . [W]ithout questioning the constitutional doctrine that the states possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism must compel the conclusion that control of Indian affairs has been delegated, under the Constitution, to the Federal Government and that state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government.

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, (1942) p.117 (U.N.Mex. Press reprint 1971). *See also* U.S. Dept. of the Interior, FEDERAL INDIAN LAW, *supra*, at pp. 501-505; 510-514.[6]

In summary, the legal rule derived from the prior decisions of this Court as to state jurisdiction on Indian reservations is that there is no state power over the affairs of the Indians, and there is state power over the affairs of non-Indians only to the extent that such jurisdiction does not infringe on the right of the Indians to govern themselves.

B. *Application to the Instant Case.*

In the case of Arizona's attempt to tax plaintiff, the three critical factors of situs, person, and subject matter (*see* FEDERAL INDIAN LAW, *supra* at p. 510) all point to exclusive Indian jurisdiction. The situs of all relevant events is the Navajo Reservation, plaintiff is Navajo, and the subject matter is within the jurisdiction of the Navajo Tribal Government. See *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F.2d 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Cf., Boyer v. Shoshone Bannock Tribes*, 92 Ida. 257, 441 P.2d 167 (1968).

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[6]See note 2 *supra* at 9.

Williams v. Lee, supra, also arose on the Navajo Reservation. This Court held that a Navajo was not subject to suit in state court based on a Reservation-incurred debt. The Court interpreted the treaty between the United States and the Navajo Tribe, 15 Stat. 667 (1868), to constitute federal recognition of the continuing right of Navajos to govern their own internal affairs. 358 U.S. at 221-222. Thus federal recognition of Navajo sovereignty antedates Arizona's statehood by 44 years.[7] The Tribe's authority over its own members under the treaty should be viewed as similar to that of a state over its residents. See *Arizona ex rel. Merrill v. Turtle,* 413 F.2d 983 (9th Cir. 1969), *cert. denied,* 396 U.S. 1003 (1970); *Buster v. Wright, supra.*

As developed in the last section, the governing legal rule as to state jurisdiction on Indian reservations is that there is no state power over the affairs of Indians, and there is state power over the affairs of non-Indians only to the extent that such jurisdiction does not infringe on the right of the Indians to govern themselves. The court below has perverted this rule by interpreting the *Williams v. Lee,* "infringement" language as sanctioning state invasion of the internal, on-reservation affairs of the Indians themselves. This is plainly inconsistent with the intent of the *Williams* decision as demonstrated by its historical development discussed above. The cases of *Helvering v. Gerhardt,* 304 U.S. 405 (1938) and *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466 (1939), relied upon by the Court below, have no application to this case. The *Helvering* case held that an employee of the state government is liable to pay federal income taxes; *Graves* held that an employee of a federal instrumentality is liable to pay state income taxes. In each of those cases, persons clearly subject to the authority of the respective governments were seeking an exception to taxing authority as to *part* of their income based on the source of that income. They contended that the tax was in effect a tax on the source of the income, which source was con-

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[7]Actually an earlier treaty constituted the first such recognition. 9 Stat. 974 (1850).

stitutionally not taxable. This Court rejected the notion that the taxes there at issue were levied on the source. However, in the instant case, the Indian residents of the Reservation are not subject to state authority in any respect as to their on-reservation affairs.

The Court below attempted to limit the federal recognition of Navajo sovereignty to the affairs of the Tribal Government as distinct from matters involving individual Indians. It then characterized the tax here at issue as "personal" and thus without the protection of Navajo sovereignty. 14 Ariz.App. at 454-5, 484 P.2d at 223-4. However, this Court rejected that approach to tribal-state relations by overruling a Montana Supreme Court case which had relied on that reasoning: *State ex rel. Kennerly v. District Court,* 154 Mont. 488, 466 P.2d 85 (1970), *judgment vacated sub. nom. Kennerly v. District Court,* 400 U.S. 423 (1971). The Montana Court had stated: "It is clear that a debt for a grocery bill is a personal matter and has no significance to Indian tribal matters." 154 Mont. at 494, 466 P.2d at 88. *Williams v. Lee, supra,* also involved the "personal" debt of an individual Navajo.

In developing its personal-tribal dichotomy, the Court below discussed three decisions of this Court which do not support its conclusion. In addition, these cases involve the affairs of Indians clearly distinguishable from the Navajos. *Leahy v. State Treasurer of Oklahoma,* 297 U.S. 420 (1936), upheld the power of the state to tax the income of an Osage Indian derived from his share of the income of the restricted mineral resources of the Tribe. *Oklahoma Tax Commission v. United States,* 319 U.S. 598 (1943) upheld the imposition of the state inheritance tax upon the transfer of the estates of three deceased members of the Five Civilized Tribes. In the latter case the Court specifically recognized the inapplicability of the principles of *Worcester v. Georgia* to the unique situation of the Oklahoma Indians:

> . . . these Indians have no effective tribal autonomy . . . and . . . they are actually citizens of the state with little to distinguish them from all other

citizens except for their limited property restrictions and their tax exemptions.

319 U.S. at 603. *Cf.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) Ch. 23 (U.N.Mex. Press reprint 1971). In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the issue was the applicability of Alaska's conservation laws off the reservation. None of the Indians involved in these three cases had a comprehensive tribal government ruling distinct territory as have the Navajos. *Cf., Williams v. Lee, supra*, 358 U.S. at 222. It is clear that the "situs" test discussed in FEDERAL INDIAN LAW, *supra*, at p. 510, is a critical determinant of state power over Indians. Thus the reliance on these three cases by the court below was plainly in error.

The Minnesota Supreme Court reached the opposite result to that of the court below in *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970). Red Lake Chippewas living and working on their reservation were held not subject to the Minnesota income tax. In addition, all commentators who have addressed the issue of state income taxes being levied on reservation Indians have concluded that the tax conflicts with tribal sovereignty as protected by the federal government and cannot constitutionally be collected. Comment, *State Taxation of Indian Income*, 2 LAW AND THE SOCIAL ORDER (Ariz.St.L.J.) 355 (1971); Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF.L.REV. 1261 (1971); Comment, *The Power of a State to Impose an Income Tax on Reservation Indians*, 6 WILLAMETTE L.J. 515 (1970); Note, *State Taxation on Indian Reservations*, 1966 UTAH L.REV. 132 (1966); *Cf.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) pp. 254, 262 (U.N.Mex.reprint 1971).

C. *Congressional Enactments.*

Through various statutory enactments, Congress has continued to recognize Indian sovereignty and exclusive federal jurisdiction and that the exercise of state jurisdiction over Indians is precluded without explicit Congressional authorization. Among these are the provisions for the retention of absolute federal jurisdiction and control over Indian lands

included in the Enabling Act for Arizona, as well as a number of other states.[8]

In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), this Court interpreted the parallel language in the Alaska Enabling Act as follows:

> . . . the words "absolute jurisdiction and control" are not intended to oust the State completely from the regulation of Indian "property (including fishing rights)". "Absolute" in §4 carried the gloss of its predecessor statutes, *meaning undiminished*, not exclusive.

Id. at 71. (emphasis added). In other words, by the inclusion of this language in the state enabling acts, Congress intended to preserve its exclusive jurisdiction over Indian affairs, undiminished by the creation of a new state.[9] See *Williams v.*

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[8]The pertinent language of the Arizona Enabling Act states:

> The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the deposition and under the absolute jurisdiction and control of the Congress of the United States. 36 Stat. 569, §20 (1910).

[9]The absolute federal jurisdiction and control language was first included in the Enabling Acts for the States of Montana, South Dakota, North Dakota, and Washington, all enacted in 1886. These were the first states admitted into the Union after this Court's decision in *United States v. McBratney, supra*, and suggest that Congress was responding to that decision, seeking to insure that the absolute federal jurisdiction over Indian affairs would not be diminished by the exercise of state jurisdiction without Congressional consent. See Note, "State Taxation on Indian Reservations," 1966 UTAH L.REV., 132, 133 (1966). This court subsequently interpreted that language as not precluding the exercise of state criminal jurisdiction over crimes involving only non-Indians occurring on Indian Reservations, *Draper v.* U.S., supra, but held a short time later that, *Draper* notwithstanding, federal jurisdiction in matters where Indians are involved remains exclusive. See *Donnelly v. United States, supra*, at 271-272. *Williams v. United States, supra*, at 714.

Lee, supra, at 222, n.10; *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 687, n.3 (1965) and see full discussion of *Worcester v. Georgia,* and its progeny, *supra,* pp. 8-9.

Public Law 280, 67 Stat. 587 (1953) and Subchapter III of the Indian Civil Rights Act of 1968, 25 U.S.C. §§1321-1326, 82 Stat. 78-80, manifest a continuing Congressional recognition of Indian sovereignty. *Williams v. Lee, supra,* 358 U.S. at 222 n.10. In Section 6 and 7 of Public Law 280, Congress deemed it necessary to give the consent of the federal government to states having express disclaimers of jurisdiction to acquire jurisdiction over Indian lands by repeal of such disclaimers.[10] If the court below were correct in its conclusion that the states have jurisdiction over reservation Indians unless specifically prohibited from doing so by Congress, the question naturally arises as to why Congress went to the trouble of enacting these statutes which gave the United States' consent to the acquisition of general jurisdiction over Indian lands. Public Law 280 would be a nullity, a futile exercise of the legislative will. The legislative history of Public Law 280 shows otherwise:

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[10]The current statute relevant to this case is 25 U.S.C. 1322(a):

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians as to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, *and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.*" (Emphasis added).

> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those states, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.

H.Rep. No. 848, 83d Cong., 1st Sess., 2 1953 U.S. Code, Cong. & Admin. News 2409, 2412.

Thus Arizona was given an opportunity to assume jurisdiction over Indians, including the power to levy its income tax, by compliance with Public Law 280. But Arizona would have also had to decide to assume many of the responsibilities toward Indians now borne by either the federal government or the tribes themselves. Arizona declined to accept these responsibilities and did not amend its laws to comply with Public Law 280. Having failed to walk the path laid out by Congress, the state cannot assume taxing authority over Indians by other means. *Kennerly v. District Court, supra.*

Federal policy with respect to state acquisition of Indian jurisdiction was changed by the passage of the Indian Civil Rights Act of 1968, repealing section 7 of Public Law 280, which had given the consent of the United States to unilateral assumption of Indian jurisdiction by a state. 25 U.S.C. §1323(b). Now the Indians must also consent. 25 U.S.C. §1326. What was not changed was the fact that Congress still found it necessary to give an express consent to any state wishing to amend its organic law in order to acquire Indian jurisdiction. 25 U.S.C. §1324; *Cf., Kennerly*

v. District Court, supra. See generally the discussion of the Indian Civil Rights Act of 1968 in the Navajo Tribe's Brief *Amicus Curiae* in Support of the Jurisdictional Statement.

In the few instances where Congress has thought it necessary to vest certain facets of jurisdiction over Indians in the states, it has been specific; *e.g.*, 25 U.S.C. §231 (enforcement of state laws affecting health and education), 25 U.S.C. §398 (taxation of mineral leaseholds on Indian lands); see *Industrial Uranium Co. v. State Tax Commission*, 95 Ariz. 130, 387 P.2d 1013 (1963). No federal statute authorizes the collection of state income taxes from reservation Indians. In fact, the Buck Act, 4 U.S.C. §§105-110, does quite the opposite. See discussion under Argument II, *infra*. That Act is a further recognition by Congress of Indian sovereignty.

The court below stated that since "tax monies of the State of Arizona were being expended for education and welfare within the confines of the Navajo Reservation and that Navajo Indians were the beneficiaries of these expenditures", 14 Ariz.App. at 456-7, 484 P.2d at 225-6, Arizona has the correlative right to tax the incomes of the Indians. This Court rejected a similar "bootstrapping" argument in *The Kansas Indians, supra* at 757:

> Conferring rights and privileges upon these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.

In addition, the Arizona court's reasoning runs counter to Public Law 280 and the Indian Civil Rights Act, discussed above. These statutes provide an explicit and exclusive means for states to acquire jurisdiction over Indians. *Kennerly v. District Court, supra.*

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE STATUTORY ALLOCATION OF TAXING AUTHORITY ESTABLISHED BY CONGRESS.

By enactment of the Buck Act, 54 Stat. 1059 (1940), *re-enacted and codified,* as 4 U.S.C. §§105-110 (1947), Congress authorized the states to collect certain taxes from residents of federal areas. Authority to collect state income taxes is conferred by 4 U.S.C. §106. However, Indians are expressly exempted from this authority by 4 U.S.C. §109.[11] The legislative history of the Buck Act demonstrates (1) that it was intended as a complete allocation of taxing authority in this field, to clear up confusion and ambiguity then thought to exist, and (2) that the Indian exemption in §109 was assumed by Congress and the state participants in the enactment of the Buck Act to protect Indians from state taxation.

Congressman Buck first introduced a bill to apply state sales and use taxes in all areas where the federal government "may have jurisdiction". H.R. 6687, 76th Cong., 1st Sess., 84 CONG. REC. 6737 (1939). This bill passed the House (84 CONG. REC. 10093) but not the Senate. The following year the Senate Finance Committee amended the bill to add state income taxes, to exempt sales by instrumentalities of the United States, and to exempt Indians. See S.REP.No. 1625, 76th Cong., 3d Sess. (1940); *Hearings on H.R. 6687 before a Subcomm. of the Senate Comm. on Finance,* 76th Cong., 3d Sess. (Apr. 23, 1940). In this form the bill was passed and became the present 4 U.S.C. §§105-110.

A report prepared by Congressman Buck stated the purpose of the Act:

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[11]The Buck Act also conferred jurisdiction in the area of state sales and use taxes, 4 U.S.C. §105. Analogous grants of jurisdiction have been made in the areas of state gasoline taxes, 4 U.S.C. §104, and state unemployment compensation laws, 26 U.S.C. §3305(d). The express Indian exemption applies to sales and use taxes as well as income taxes. 4 U.S.C. §109.

> Divergent views being expressed by taxpayers and taxing authorities makes [*sic*] it evident that prolonged and expensive litigation will be required to clarify the law on the subject if the limits of state authority with respect to the various types of Federal areas are to be established through judicial decisions. This litigation and the period of uncertainty which will necessary [*sic*] exist pending final decisions by the United States Supreme Court may, however, be avoided through Congressional action. . .

Hearings, supra, p. 3.

Whether the grant of taxing authority should apply to Indian reservations was vigorously discussed. A spokesman for the states of California and Washington argued for the inclusion of Indian reservations in the Act. *Hearings, supra,* p. 12; see also the reference to Indian traders at *Hearings, supra,* p. 2. The Interior Department on the other hand sought the exclusion of Indian reservations. Letter from E. K. Burlew to Senate Finance Committee printed at 84 CONG. REC. 10685 (1939); letter from Governor Miles of New Mexico, Hearings, *supra,* p. 2. But the provision enacted at 4 U.S.C. §109 followed the urging of a representative of New Mexico, set out at *Hearings, supra,* pp. 18-20. He urged the exemption of Indians but not of Indian reservations:

> . . . [W]e have no desire to tax the Indians. They are exempt from taxation in our State, but we do not believe that because a man establishes a store on Indian lands competing with a store outside, the store inside should be exempt from all taxation, and the store outside should pay.

Hearings, supra, p. 19.

The legislative history does not directly discuss the phrase in 4 U.S.C. §109 "Indians not otherwise taxed." However, the most sensible interpretation, consistent with the legislative history and with giving a logical meaning to the

statute, is that the phrase was intended to distinguish Indians under federal protection and control from those not. This would usually refer to reservation Indians as opposed to those residing elsewhere, but there are certain traditional trust areas outside of reservations whose residents are recognized as under federal protection. See *Hearings on H.R. 9417 before the Senate Comm. on Appropriations*, 92d Cong., 1st Sess., part 1 at 751-755 (1971).

The phrase in §109 resembles the phrase "Indians not taxed" in the Constitution and in many statutes. See discussion in F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942).p. 157 (U.N.Mex. Press reprint 1971). There are no longer any Indians as to which this phrase is literally true (HANDBOOK OF FEDERAL INDIAN LAW, *supra* at p. 254), but one commentator as late as 1934 defined it as "probably meaning today Indians resident on reservations, that is, on land not taxed by the state." Rice, *The Position of the American Indian in the United States*, 16 J.COMP.LEG. 78 (1934), as quoted in HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at p. 89.

4 U.S.C. §109 has been cited only once in a reported case, *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 691 n.18 (1956). That footnote in turn referred to *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 *cert. denied* 368 U.S. 915 (1961). Both cases dealt with taxation of non-Indians on Indian reservations, and neither interpreted 4 U.S.C. §109. (The New Mexico case did not even cite it.) The conclusion in the New Mexico case that the Buck Act was not intended to apply to non-Indians on Indian reservations seems plainly inconsistent with the legislative history of the Buck Act as set out above. Thus it is difficult to draw any conclusion from these decisions relevant to the instant case.

In the Buck Act, Congress fully allocated state authority to levy income taxes on persons under federal jurisdiction,

and trust Indians were expressly exempted.[12] The decision below and the actions of appellee here at issue conflict with the Buck Act, a "governing act of Congress." *Williams v. Lee, supra,* 358 U.S. at 221. State action inconsistent with a valid federal statute is invalid. *Warren Trading Post Co. v. Arizona Tax Commission, supra. Cf., Humble Pipe Line Co. v. Waggoner,* 376 U.S. 368, 373: "[W]hen Congress has wished to allow a state to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 U.S.C. §§104-110."

CONCLUSION

For the above and foregoing reasons the judgment of the court below should be vacated and remanded.

Respectfully submitted,

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[12]Congress clearly has the Constitutional authority to exempt trust Indians. *Choate v. Trapp,* 224 U.S. 665, 571 (1912); see generally HANDBOOK OF FEDERAL INDIAN LAW, *supra,* Ch. 13.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated,

Appellant,

v.

ARIZONA STATE TAX COMMISSION,

Appellee.

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF APPELLANT

Native American Rights Fund files the following brief amicus curiae with the consent of Appellant Rosalind McClanahan and Appellee Arizona State Tax Commission. Written consents of both parties, by letter, are on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Native American Rights Fund [hereinafter the Fund] is a private, non-profit corporation organized for the purpose of protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance. The Fund appears and submits this brief amicus curiae because of its general interest in the subject of state taxation of Indians and Indian

property in Indian Country. The Fund has several Indian tribal clients and individual Indian clients in cases which concern the validity of several forms of state taxation within the territory of self-governing Indian tribes.

Since this case will establish an important precedent regarding the power of states to tax Indians in Indian Country, and because this precedent will have effects in states other than Arizona, the Native American Rights Fund supports the powers of self-governing tribes on Indian reservations throughout the country.

ARGUMENT

It is the position of the Native American Rights Fund as amicus curiae that the State of Arizona is without power to tax the income of a Navajo Indian working and residing on the Navajo Reservation.

I

NO SPECIFIC ACT OF CONGRESS AUTHORIZES THE TAXATION OF INDIAN INCOME BY THE STATE OF ARIZONA NOR HAS ARIZONA FOLLOWED THE EXCLUSIVE STATUTORY PROCEDURE PROVIDED BY CONGRESS TO GIVE FORCE AND EFFECT TO ITS INCOME TAX LAWS WITHIN THE NAVAJO RESERVATION.

In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall set down the landmark principle which has guided this Court through the years in its protection of Native Americans and the independence of self-governing Indian tribes:

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force,* and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in con-

formity with treaties and with the Acts of Congress. 31 U.S. at 561. [Emphasis added.]

Given *Worcester* and its progeny, the only possible source for state taxing power over a Navajo Indian residing and working on his reservation would be an Act of Congress conferring that power upon it. Congress has plenary power over Indian affairs,* and has on occasion transferred some of its power to the states.**

Congress did not grant the State of Arizona or any other state the authority to extend the application of its general laws to Indian Country until the adoption of Public Law 280, Act of August 15, 1953, 67 Stat. 588. By this Act, Congress extended to certain named states, *not including Arizona*, jurisdiction over civil causes of action and criminal offenses occurring within Indian Country in those states subject to certain exceptions. With respect to the states—such as Arizona—not specifically named in Public Law 280, Sections 6 and 7 of that Act provided procedures by which jurisdiction of causes of action in Indian Country could be assumed.*** It is undisputed that Arizona has not followed these procedures and has not acquired jurisdiction in the Navajo Nation.

In addition to granting permission for the assumption of jurisdiction, Congress also provided in Section 4 of Public Law 280, that:

> . . . those civil laws of such state that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state . . . 67 Stat. at 589.

**Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

**Such laws as have been passed extending state power in Indian Country include 25 U.S.C. 231 (dealing with compulsory school attendance and health and sanitation regulations) and 25 U.S.C. §398c (dealing with state taxation of property on executive order reservations).

***67 Stat. at 590.

In short, Congress intended that a state complying with Public Law 280 would be permitted to apply some portion of its general substantive law in the Indian Country when it assumed civil and criminal jurisdiction. That some application of tax laws in Public Law 280 states was contemplated by Congress can be inferred from the savings provisions in the statute reaffirming the tax-exempt status of some Indian property:

> Nothing in this section shall authorize the . . . taxation of any real or personal property . . . belonging to any Indian . . . that is held in trust by the United States . . . 67 Stat. at 589.

The precise scope of the Congressional permission to apply state substantive law in Indian Country under Public Law 280 is not presented by this case, and need not be decided.* It is clear, however, that whatever taxing authority, if any, that Congress intended to confer upon a state taking affirmative action to assume jurisdiction under Public Law 280, that a state not taking such affirmative legislative action acquires no taxing power of any kind.

The legislative history of Public Law 280 clearly supports the argument of Amicus that state substantive law can be applied in Indian Country only upon compliance with Public Law 280:

> Permitting state courts to adjudicate several controversies arising on Indian reservations, and to extend to those reservations *the substantive civil laws* of the respective states insofar as those laws are of general application to private persons or private property, is deemed desirable. S. Rep. 699, H. Rep. 848 on H.R. 1063, 83rd Cong., First

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*In *Menominee Tribe v. United States*, 391 U.S.404 (1968) this Court construed the Menominee Termination Act of 1954 *in pari materia* with Public Law 280, and concluded that treaty protected rights survived both termination of the Menominee Tribe and the application of Public Law 280 in Wisconsin.

Sess., 1953 U.S. Code Congressional & Administrative News at 2412. [Emphasis added.]

By the Act of April 11, 1968, Congress amended Public Law 280 to require tribal consent to the assumption of jurisdiction by a state.* Appellee does not contend that the Navajo Tribe has consented to the extension of the Arizona income tax by holding a special election in compliance with Section 406 of Public Law 90-284, 25 U.S.C. §1326.

At a time when Congress has substantially retracted state jurisdiction over Indian Country, and protected affected tribes from its unilateral assertion, the Arizona State Tax Commission would have this Court substantially expand state power over reservation Indians without any of the procedural protection of Public Law 280.

The decisions of this Court make it plain that it is for Congress to decide when and under what conditions a state may exercise jurisdiction and apply its laws in Indian Country. And the Court has held that procedures provided by Congress are the exclusive means by which a state may obtain such jurisdiction. *Williams v. Lee*, 358 U.S. 217 (1959), *Kennerly v. Montana District Court*, 400 U.S. 423 (1971).

For this Court to uphold the position of Arizona in this case would be to contravene the principle of *Williams* and *Kennerly* and the clearly expressed will of Congress by authorizing the state, without either its own affirmative legislative action or the consent of the affected Indians, to assume jurisdiction.** Moreover, affirming the power of the State of Arizona to tax the income of an Indian working

*Public Law 90-284, §406, 82 Stat. 79, 25 U.S.C. §1326.

**That Congress must have contemplated that no state taxing power would exist until a state assumed jurisdiction is abundantly clear from the fact that in the absence of jurisdiction, no state civil or criminal remedy would lie to enforce the payment of tax against Indians. See *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970); *Employment Security Dept. v. Cheyenne River Sioux Tribe*, 80 S.D. 79, 119 N.W.2d 285 (1963).

and residing on the Reservation would thwart the entire policy of Public Law 280 by permitting the State to tax without concurrently assuming the obligation to provide the full range of state services to Indians as a Public Law 280 state is required to do.

In *Williams, supra*, the Court said:

> In a general statute Congress did express its willingness to have any state assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. [citing Act of August 15, 1953 c. 505, §§6, 7, 67 Stat. 590] To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable. 358 U.S. at 222.

II

THE RULE OF *WILLIAMS V. LEE* DOES NOT GRANT TO STATES JURISDICTION WHICH CONGRESS HAS WITHHELD.

In the face of the foregoing established principles of law, Arizona asserts the right to tax the income of Navajo Indians within the Navajo Nation. The vehicle for this assertion of state power in this Court's holding in *Williams v. Lee, supra*. The state's reliance on *Williams* is ironic for two reasons. First, this Court in *Williams* denied the state's claim of juridiction. Secondly, the language of *Williams v. Lee* itself is very clear on the subject of the vitality of *Worcester v. Georgia, supra:*

> Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be

jeopardized, *but the basic policy of Worcester has remained.* 358 U.S. at 219. [Emphasis added.]

In spite of the continued vitality of the *Worcester* doctrine, Arizona seeks in the Supreme Court of the United States to accomplish what it has been unwilling to accomplish under the mechanism provided for by Congress.

The state would, in effect, stand *Williams* on its head. In *Williams,* the Court denied the state claim of jurisdiction because it would infringe "on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. The State now asserts taxing jurisdiction, despite its failure to follow Public Law 280 procedures, because state taxation does not infringe tribal self-government. In so doing, it would convert *Williams* from a shield for tribal self-government into a sword for expansion of state jurisdiction.

Williams was never intended to be so used. It does not mandate a case-by-case determination, on an ad hoc basis, of whether this or that state law "infringes" tribal sovereignty. Such a rule would be productive of undue litigation, and subject the states, Indians and persons dealing with them to pronounced uncertainties.

Rather, *Williams* requires that (1) where the state has not followed Public Law 280 procedures, and (2) there is a functioning tribal government, then *Worcester* bars the application of state law to Indians.

None of the cases used by the Court in formulating the *Williams* "infringement" test dealt with the application of state law to reservation Indians. Exercises of state power which were acknowledged by the Court to be "non-infringing" include suits by Indians against outsiders in state court,* state criminal prosecutions of one non-Indian for

Williams, supra, at 219, 220 citing *Felix v. Patrick,* 145 U.S. 317 (1892), *United States v. Candaleria,* 271 U.S. 432 (1926).

the murder of another in Indian Country,* and territorial taxation of non-Indian owned railroad property located on reservations.**

Arizona relies heavily upon this Court's opinion in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). Amicus insists that the reliance is misplaced. It was held in that case that Alaska could regulate trap fishing because no reservation existed from which the right to fish might be implied. A contrary result would have been reached had such a reservation existed. Compare *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962).

The present case is entirely distinguishable. The Navajo Nation is a self-governing tribe controlling a large territory which includes parts of three states. The tribe's right to govern the Indians' internal affairs is secured by treaty. *Williams, supra*, 358 U.S. at 321, 322. Moreover, while Arizona has acquired no jurisdiction in Indian Country, Congress has explicitly granted Alaska jurisdiction. 72 Stat. 545, 18 U.S.C. §1162, 28 U.S.C. §1360.

In spite of the non-reservation context, the Court in *Kake*, after discussing several cases involving application of state law to *non-Indians* on reservations,*** concludes:

> These decisions indicate that even on reservations state laws may be applied *to Indians* unless such

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New York ex rel Ray v. Martin, 326 U.S. 496 (1946); See also, *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896); *Donnelly v. United States*, 228 U.S. 243 (1913).

***Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885); *Accord, Maricopa and Phoenix R. Co. v. Territory of Arizona*, 156 U.S. 347 (1895).

***In addition to citing *William v. Lee*, the Court relies upon *Thomas v. Gay*, 169 U.S. 264 (1898) (sustaining an Oklahoma territorial law taxing as personal property the cattle of non-Indians on an Indian reservation) and *Langford v. Monteith*, 102 U.S. 145 (1880) (A non-Indian may sue another non-Indian in state court to obtain possession of buildings located on a reservation). *Fisher, Maricopa, and Martin* discussed *supra* also involved no application of state law or jurisdiction affecting Indians.

> application would interfere with reservation self-government or impair a right granted or reserved by federal law. 369 U.S. at 75. [Emphasis added.]

Amicus contends that such a conclusion was an unwarranted extension of the case law.

The Arizona court also bases its holding upon *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936) and *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). The application of state law to Oklahoma Indians is a non-infringing exercise of state power because of the peculiar status of Oklahoma tribes and can have no relevancy in the instant case. As this Court acknowledged in *Oklahoma Tax Commission:*

> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the former tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia, supra*, and, unlike the Indians involved in *The Kansas Indians* case, supra, they are actually citizens of the State, with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions. 319 U.S. at 603.

Tribal governments in Oklahoma were substantially abolished just prior to statehood. See, e.g., Act of June 28, 1898, 30 Stat. 495. In sharp contrast to this situation, the Navajo Tribe has not relinquished any of its powers of self-government. It maintains its own courts and police force, its schools are models for federal Indian education, and its reservation program is the largest in the nation.

Characteristic of the Arizona court's rush to a judgment of taxability of Navajo income is its cursory treatment of the reasoning in *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W. 2d 120 (1970). That case rejected the attempted state taxation of the income of reservation Red Lake

Chippewas,* in a case entirely analogous to that of the Navajos here. The Minnesota court concluded that Minnesota's income tax infringed upon tribal self-government under the *Williams* rule. The Minnesota court correctly distinguishes the situation of the Oklahoma tribes and Alaska communities which Arizona's court uses so advantageously and incorrectly. Amicus respectfully submits that the Minnesota case reaches the correct result. While its analysis does not draw on the teaching of *Kennerly, supra,* that a state must act affirmatively to apply its laws to Indians, its conclusion is entirely consistent with *Kennerly*.

In summary, Amicus submits that the correct interpretation of the rule in *Williams v. Lee* requires that the *Worcester* rule prevails except where (1) a state has accepted Public Law 280 jurisdiction over Indian Country; or (2) the asserted jurisdiction involves non-Indians in Indian Country, or (3) the matter arises on Indian land where there is no established tribal government.

*The Red Lake Band of Chippewas was explicitly excluded by Congress from the grant of jurisdiction to Minnesota in Public Law 280, 67 Stat. 588.

CONCLUSION

Amicus urges that this Court reverse the judgment of the Court of Appeals of Arizona since Congress has not explicitly permitted Arizona to apply its income tax on the Navajo Reservation, and since Arizona has not availed itself of the Congressional consent to apply its laws in Indian Country. Amicus respectfully requests that this Court refuse to give by judicial fiat, taxing power which the State of Arizona has not been granted by Congress. In this way, this Court can maintain its systematic guardianship of the authority of Indian governments over their reservations.

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